


# ***CR 2008/77 - Income tax: return of capital: Olea Australis Limited***

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## Class Ruling

### Income tax: return of capital: Olea Australis Limited

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 6(4) of ITAA 1936;
- section 44 of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-25 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-135 of the ITAA 1997; and

- Division 855 of the ITAA 1997.

All references are to the ITAA 1936 unless otherwise stated.

## **Class of entities**

3. The class of entities to which this Ruling applies consists of the ordinary shareholders of Olea Australis Limited (Olea) who:

- (a) are registered on the Olea share register on the Record Date; and
- (b) held their Olea shares on capital account.

In this Ruling, a person belonging to this class of entities is referred to as an 'Olea shareholder'.

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise scheme in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 22 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 July 2008 to 30 June 2009. The Ruling continues to apply after 30 June 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The following description of the scheme is based on information provided by the applicant, KPMG. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application dated 12 May 2008; and
- additional information provided by the applicant between 12 May 2008 and 7 October 2008.

**Note:** certain information received from the applicant has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

10. Olea is an Australian resident company which was incorporated in 1999 and listed on the Australian Securities Exchange (ASX) in 2000.

11. Olea is the parent company of a group of entities (the Olea group) that, prior to the sale of the majority of its business assets, engaged in the growing and processing of olives, and the processing, packaging and marketing of olive oil. The Olea group has not elected to form a tax consolidated group.

12. On 21 November 2007, Olea signed an agreement for the sale of the Olea group's main undertaking (including land, the olive groves, buildings and all associated plant and equipment) to another company for total consideration of \$18,656,579 (the Sale).

13. Olea proposes to distribute the net cash proceeds from the Sale totalling \$15,108,744 to all of its shareholders in the following manner:

- a dividend of \$1,523,208 equating to 0.247 cents per share (the proposed dividend) which when paid is assessable income of a shareholder under section 44(1); and
- a return of capital of \$13,585,536 equating to 2.203 cents per share (the proposed return of capital).

14. Olea intends to pay the proposed dividend and the proposed return of capital to its shareholders on the same date, following shareholder approval of the proposed return of capital.
15. The proposed dividend and the proposed return of capital will be paid to all entities who own Olea shares on the Record Date.
16. Olea will debit the whole of the proposed return of capital against its share capital account. Olea has confirmed that its share capital account (as defined in section 975-300 of the ITAA 1997) is not tainted (within the meaning of Division 197 of the ITAA 1997).
17. The proposed return of capital is to be paid to all shareholders equally and will not result in any shares being cancelled.
18. As at 6 October 2008, Olea had only one class of share on issue comprising 616,683,423 fully paid ordinary shares. As at 30 June 2008, Olea's issued capital was \$18,920,019.
19. Olea's shareholders are a mix of individuals, companies, superannuation funds and foreign residents.
20. In March 2008, Olea announced an on-market share buy-back of up to 60 million shares as part of its capital management strategy. To date 670,189 shares have been bought back for consideration of \$15,004.
21. Given its overall loss position, Olea has never paid a dividend since its incorporation. The Olea group has typically relied on capital raisings to obtain working capital for its operations.
22. Following the Sale, the Olea group has retained a brand name and the right to sale proceeds from the 2008 harvest.

## Ruling

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### **Distribution is not a dividend for income tax purposes**

23. The proposed return of capital to the Olea shareholders will not be a dividend, as defined in subsection 6(1).

### **The application of sections 45A, 45B and 45C to the proposed return of capital**

24. The Commissioner will not make a determination under sections 45A or 45B that section 45C applies to the proposed return of capital. Accordingly, no part of the proposed return of capital will be taken to be a dividend for income tax purposes.

**Capital gains tax**

25. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Olea pays the proposed return of capital to an Olea shareholder in respect of an Olea share that they own at the Record Date and continue to own at the payment date.

26. CGT event C2 (section 104-25 of the ITAA 1997) will happen when Olea pays the proposed return of capital to an Olea shareholder in respect of an Olea share that they owned at the Record Date but ceased to own before the payment date.

**Foreign resident shareholders**

27. A foreign resident shareholder in Olea who is paid the proposed return of capital disregards any capital gain made from CGT event G1 happening if their Olea shares are not 'taxable Australian property' (section 855-10 of the ITAA 1997).

28. A foreign resident shareholder in Olea who is paid the proposed return of capital disregards any capital gain or capital loss made from CGT event C2 happening if their right to receive the return of capital is not 'taxable Australian property' (section 855-10 of the ITAA 1997).

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**Commissioner of Taxation**19 November 2008

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## Appendix 1 – Explanation

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**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Dividend

29. Subsection 44(1) includes in a shareholder's assessable income any dividends, as defined in subsection 6(1), paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident of Australia).

30. The term 'dividend' in subsection 6(1) includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' of subsection 6(1) excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

31. The term 'share capital account' is defined in section 975-300 of the ITAA 1997 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

32. Subsection 975-300(3) of the ITAA 1997 states that an account is not a share capital account if it is tainted.

33. The proposed return of capital will be recorded as a debit to Olea's share capital account. As the share capital account of Olea is not tainted within the meaning of Division 197 of the ITAA 1997, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies. Accordingly the proposed return of capital will not constitute a dividend.

### Subsection 6(4)

34. The exclusion in paragraph (d) of the definition of dividend is limited by subsection 6(4) which applies in circumstances where, under an arrangement:

- a company raises share capital, receiving either cash or property from a person or group of persons crediting it to its share capital account; and
- returns it to another person or group of persons, giving them either cash or property, debiting it to its share capital account.

35. Olea issued 175,171,737 shares at \$0.018 per share in the period between March 2007 and August 2007.

36. These shares were issued in two transactions. The first was as part of a 1 for 3 renounceable rights issue around late March and early April 2007. The second was a placement in July and August 2007 which included shares issued to a new appointee to the Board of Olea.

37. Olea has typically relied on capital raisings to obtain working capital for its operations. The purpose of the placement was to provide Olea with working capital required for its business at that time.

38. Olea subsequently decided that it would sell the majority of the business assets of the Olea group as a way of realising value for its shareholders. As there was no need for the surplus sale proceeds Olea had legitimate reasons to return these funds to all of its shareholders by way of a dividend and pro-rata return of capital.

39. In the present case no arrangement exists under which Olea raised share capital from certain shareholders and then distributed the capital raised to other shareholders.

40. As the capital raisings were to raise working capital for company operations rather than part of an arrangement to enable capital distributions subsection 6(4) will have no application in respect of the proposed return of capital.

### **Anti-avoidance provisions**

41. Sections 45A and 45B are two anti-avoidance provisions which, if they apply, allow the Commissioner to determine that all or part of a distribution is treated as an unfranked dividend that is paid by the company out of profits to the shareholder.

### **Section 45A**

42. Section 45A applies where capital benefits are streamed to some shareholders (the Advantaged Shareholders), who would derive a greater benefit from the capital benefits than other shareholders (the Disadvantaged Shareholders) and these Disadvantaged Shareholders receive, or are likely to receive, dividends.

43. A reference to the 'provision of a capital benefit to a shareholder in a company' is defined in section 45A(3) to include the distribution to the shareholder of share capital. The proposed return of share capital in the present case by Olea to its shareholders will constitute the provision of a capital benefit. However, as Olea will make a pro-rata return of capital to all of its shareholders in respect of their ordinary shares in Olea, there will be no streaming of capital benefits to some shareholders and not to others.

44. Therefore, section 45A will have no application in respect of the proposed return of capital. Accordingly, the Commissioner will not make a determination under subsection 45A(2) that section 45C applies in relation to the whole, or a part, of the capital benefit.

## **Section 45B**

45. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. It allows the Commissioner to make a determination that section 45C applies to a capital benefit. The effect of such a determination is that all or part of the distribution of capital received by the shareholder under the return of capital is treated as an unfranked dividend.

46. In broad terms, section 45B applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a));
- (b) under the scheme, a taxpayer, who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)); and
- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose), of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

47. Each of these conditions is considered below.

### *Scheme*

48. A 'scheme' for the purposes of section 45B is taken to have the same meaning as provided in subsection 177A(1). That definition is widely drawn and includes any agreement, arrangement, understanding, promise, undertaking, scheme plan or proposal.

49. Accordingly the proposed return of capital to the Olea shareholders would constitute a scheme for the purposes of paragraph 45B(2)(a).

### *Capital benefit*

50. The phrase 'provided with a capital benefit' is defined in subsection 45B(5). It states that a person is provided with a capital benefit if:

- an ownership interest in a company is issued to the person;

- there is a distribution to the person of share capital; or
- the company does something in relation to an ownership interest that has the effect of increasing the value of the ownership interest (which may or may not be the same interest) held by that person.

51. As the amount of the proposed return of capital is to be debited to Olea's share capital account, its shareholders are taken to have been provided with a capital benefit under paragraph 45B(5)(b).

#### *Tax benefit*

52. A taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been a dividend

53. In the event that the return of capital did represent a dividend rather than a capital benefit, it is likely that the Olea shareholder would have incurred a greater tax liability. Consequently, the Olea shareholders will obtain tax benefits from the proposed return of capital.

#### *Relevant circumstances*

54. For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' set out in subsection 45B(8) to determine whether any part of the scheme would be entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit. However, the list of relevant circumstances in subsection 45B(8) is not exhaustive and regard may be had to other circumstances on the basis of their relevance.

55. The test of purpose is an objective one. The question is whether it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The requisite purpose does not have to be the most influential or prevailing purpose but it must be more than an incidental purpose.

56. The purpose which causes section 45B to apply may be the purpose of any party to the scheme.

57. In this instance, as the return of capital is to be made to all Olea shareholders, regardless of their individual circumstances, paragraphs 45B(8)(c) to (h) do not incline for, or against, a conclusion as to purpose. The circumstances covered by paragraphs 45B(8)(i) to (j), pertaining to the provision of ownership interests and demerger, are not relevant here. In this case, the relevant matters are those covered by the circumstances described in paragraphs 45B(8)(a), (b) and (k).

58. Paragraph 45B(8)(a) refers to the extent to which the capital benefit is attributable to capital or profits (realised and unrealised) of the company or an associate (within the meaning of section 318) of the company. In this case, Olea has decided to return to its shareholders contributed share capital that was released upon the Sale.

59. The Sale also generated profits for Olea which are to be distributed as dividends at the same time as the proposed return of capital. Olea is now left only with the Dandaragan Estate brand name and a marketing company, OAM. Olea is of the opinion that the cash holdings generated from the disposal of the majority of the assets are in excess of current and future capital requirements and intends to distribute this surplus back to its shareholders.

60. The amount of the proposed return of capital is reasonably regarded as share capital invested in the assets disposed of by the Sale. In view of the proposed dividend, the proposed return of capital is wholly attributable to the share capital released from the Sale.

61. Paragraph 45B(8)(b) refers to the pattern of distributions made by a company or an associate of the company. Olea does not have a dividend policy and, given its overall loss position, has not paid any dividends since its incorporation.

62. Olea has not previously issued bonus shares or made a return of share premium. In March 2008, Olea announced an on-market share buy-back of up to 60,000,000 shares (which represented less than 10% of the ordinary shares on issue at that time). As at 30 June 2008, Olea had bought back 670,189 shares for a consideration of \$15,004. Olea has not undertaken any other share capital reductions. The proposed return of capital is in addition to the payment of the proposed dividend out of the profits realised from the Sale.

63. This circumstance neither inclines for or against a conclusion as to purpose.

64. Paragraph 45B(8)(k) refers to the matters in subparagraphs 177D(b)(i) to (viii). These are matters by reference to which a scheme is able to be examined from a practical perspective in order to identify and compare its tax and non-tax objectives. The matters include the manner in which the scheme is carried out, its form and substance, and its financial and other implications for the parties involved. In the present circumstances the practical implications of the scheme for Olea and its shareholders are consistent with its being, in form and substance, a return of capital.

65. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to the proposed return of capital.

### **Capital gains tax**

#### ***CGT event G1 – section 104-135***

66. CGT event G1 (section 104-135 of the ITAA 1997) will happen when Olea pays the proposed return of capital to an Olea shareholder in respect of a share that they own in Olea at the Record Date and continue to own at the payment date, and some or all of the return of capital is not a dividend (as defined in subsection 995-1(1) of the ITAA 1997) or a deemed dividend under section 47 of the ITAA 1936.

67. Olea intends to pay the entire proposed return of capital out of its untainted share capital account. No part of the return of capital will be a dividend. If the return of capital (2.203 cents per share) is not more than the cost base of the Olea share at the payment date, the cost base and reduced cost base of the share will be reduced by the amount of the return of capital (subsection 104-135(4) of the ITAA 1997).

68. An Olea shareholder will make a capital gain if the return of capital is more than the cost base of the Olea share (subsection 104-135(3) of the ITAA 1997). The amount of the capital gain is equal to that excess.

69. If an Olea shareholder makes a capital gain from CGT event G1 happening, the cost base and reduced cost base of the Olea share are reduced to nil. An Olea shareholder cannot make a capital loss from CGT event G1 happening (subsection 104-135(3) of the ITAA 1997).

70. If the Olea share to which the return of capital relates was acquired by an Olea shareholder at least 12 months before the payment, a capital gain from CGT event G1 happening may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997, provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

## ***CGT event C2 – section 104-25***

71. The right to receive the payment of the proposed return of capital is one of the rights inherent in an Olea share at the Record Date. If, after the Record Date but before the payment date, an Olea shareholder ceases to own some, or all, of their shares in Olea, the right to receive the payment of the proposed return of capital in respect of each of the shares disposed of will be retained by the shareholder and is considered to be a separate CGT asset.
72. CGT event C2 (section 104-25 of the ITAA 1997) will happen when the return of capital is paid. The right to receive the payment (being an intangible CGT asset) will end by the right being discharged or satisfied when the payment is made.
73. An Olea shareholder will make a capital gain if the capital proceeds from the ending of the right are more than the cost base of the right. An Olea shareholder will make a capital loss if the capital proceeds from the ending of the right are less than the reduced cost base of the right (subsection 104-25(3) of the ITAA 1997).
74. In working out the capital gain or capital loss made from CGT event C2, the capital proceeds will be the amount of the return of capital (subsection 116-20(1) of the ITAA 1997).
75. The cost base of an Olea shareholder's right to receive the return of capital is worked out under Division 110 of the ITAA 1997 (modified by Division 112 of the ITAA 1997). The cost base of the right does not include the cost base or reduced cost base of the share previously owned by the Olea shareholder that has been applied in working out a capital gain or capital loss made when a CGT event happened to the share – for example, when the Olea shareholder disposed of the share after the Record Date.
76. Therefore, if the full cost base or reduced cost base of an Olea share has been previously applied in working out a capital gain or capital loss made when a CGT event happened to that share, the right to receive the proposed return of capital will have a nil cost base. Therefore, a capital gain equal to the amount received as the return of capital is likely to arise.
77. As the right to receive the return of capital was inherent in the Olea share during the time it was owned, the right is considered to have been acquired at the time when the share was acquired (section 109-5 of the ITAA 1997).
78. If the Olea share to which the return of capital relates was originally acquired by an Olea shareholder at least 12 months before the payment, a capital gain from CGT event C2 happening to the right may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997, provided the other conditions in Subdivision 115-A of the ITAA 1997 are satisfied.

**Foreign resident shareholders**

79. Under section 855-10 of the ITAA 1997, an entity disregards a capital gain or capital loss from a CGT event if they are a foreign resident just before the CGT event happens, and the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

80. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. It covers five categories of CGT assets:

- (1) taxable Australian real property which is held directly;
- (2) indirect Australian real property interests which are not covered by item 5 of the table;
- (3) CGT assets used in carrying on a business through a permanent establishment in Australia, and which are not covered by item 1, 2 or 5 of the table;
- (4) options or rights to acquire a CGT asset covered by item 1, 2 or 3 of the table; and
- (5) CGT assets covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident).

81. Accordingly, an Olea shareholder disregards a capital gain from CGT event G1 happening on the payment of the return of capital if they are a foreign resident just before the CGT event happens, and if the Olea shares are not 'taxable Australian property'.

82. An Olea shareholder disregards a capital gain or capital loss from CGT event C2 happening to their right to receive the return of capital if they are a foreign resident just before the CGT event happens, and if the right is not 'taxable Australian property'.

**Appendix 2 – Detailed contents list**

83. The following is a detailed contents list for this Ruling:

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## References

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<i>Previous draft:</i>	- ITAA 1936 45B(8)(k)
Not previously issued as a draft	- ITAA 1936 45B(9)
	- ITAA 1936 45C
<i>Related Rulings/Determinations:</i>	- ITAA 1936 177A(1)
TR 2006/10	- ITAA 1936 177D(b)
	- ITAA 1936 177D(b)(i)
	- ITAA 1936 177D(b)(ii)
<i>Subject references:</i>	- ITAA 1936 177D(b)(iii)
- return of capital on shares	- ITAA 1936 177D(b)(iv)
	- ITAA 1936 177D(b)(v)
<i>Legislative references:</i>	- ITAA 1936 177D(b)(vi)
- ITAA 1936	- ITAA 1936 177D(b)(vii)
- ITAA 1936 6(1)	- ITAA 1936 177D(b)(viii)
- ITAA 1936 6(4)	- ITAA 1936 318
- ITAA 1936 44	- ITAA 1997
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- ITAA 1936 45A	- ITAA 1997 104-25(3)
- ITAA 1936 45A(2)	- ITAA 1997 104-135
- ITAA 1936 45A(3)	- ITAA 1997 104-135(3)
- ITAA 1936 45B	- ITAA 1997 104-135(4)
- ITAA 1936 45B(2)(a)	- ITAA 1997 104-165(3)
- ITAA 1936 45B(2)(b)	- ITAA 1997 109-5
- ITAA 1936 45B(2)(c)	- ITAA 1997 Div 110
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- ITAA 1936 45B(5)	- ITAA 1997 Subdiv 115-A
- ITAA 1936 45B(5)(b)	- ITAA 1997 115-25(1)
- ITAA 1936 45B(8)	- ITAA 1997 116-20(1)
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- ITAA 1936 45B(8)(d)	- ITAA 1997 855-15
- ITAA 1936 45B(8)(e)	- ITAA 1997 975-300
- ITAA 1936 45B(8)(f)	- ITAA 1997 975-300(3)
- ITAA 1936 45B(8)(g)	- ITAA 1997 995-1(1)
- ITAA 1936 45B(8)(h)	- TAA 1953
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- ITAA 1936 45B(8)(j)	

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### ATO references

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